COPY

No. 3459.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

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INDEX TO PRINTED BRIEF OF PLAINTIFF IN ERROR.

PAGE

Argument and Authorities 5

Specifications of Error 4

Statement of the Case................................. 3

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Southern District of California,

Southern Division.

Harry Dean, *Plaintiff in Error,* vs. The United States of America, *Defendant in Error.*	

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error was proceeded against in the District Court of the Southern District of California, Southern Division, under an indictment purporting to charge him with a violation of the Harrison Narcotic Law, as amended by the act of Congress, approved February 24th, 1919. The indictment was in two counts, and defendant below, plaintiff in error herein, was found guilty by a jury of both counts in the in-

dictment. Thereafter he was sentenced by the Honorable Benjamin F. Bledsoe, below, to imprisonment at McNeil's Island, state of Washington, for a term and period of four (4) years upon each count in the indictment, the sentence upon the second count of the indictment to begin at the expiration of the sentence on the first count. From the said judgment plaintiff in error prosecutes this writ of error.

SPECIFICATIONS OF ERROR.

I.

That the court erred in rendering its judgment against the plaintiff in error upon Count One of the indictment in this cause, for the reason that the said Count One of the indictment in said cause does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law or statute of the United States of America, whatsoever or at all.

II.

That the court erred in rendering its judgment in this cause against the plaintiff in error upon Count Two of the indictment in this cause for the reason that the said Count Two of the indictment does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law of the United States of America whatsoever or at all.

ARGUMENT AND AUTHORITIES.

That the Court Erred in Rendering Its Judgment Against the Plaintiff in Error Upon Count One of the Indictment in This Cause, for the Reason That the Said Count One of the Indictment in Said Cause Does Not State Facts Sufficient to Constitute a Public Offense, or Any Offense or Crime Against the Laws or Statutes of the United States of America, or the Violation of Any Law or Statute of the United States of America, Whatsoever or at All.

The said count of the indictment does not state facts sufficient to constitute an offense against the United States since *in effect* it merely charges the defendant with having certain narcotics in his possession, which we contend is not a violation of the Harrison Narcotic Act, as amended by an act of Congress, approved February 24th, 1919.

It is unnecessary to draw this Honorable Court's attention to the numerous provisions of the Harrison Act. We contend that the gist of a violation of the act is the purchasing, dispensing, distributing, etc., of narcotics from packages or receptacles which have not affixed thereon appropriate tax-paid stamps; the Harrison Narcotic Act is a revenue act. The indictment in said cause reads as follows:

"INDICTMENT.

Viol. Act Feb. 24, 1919, an Amendment to Harrison Narcotic Act.

At a stated term of said court, begun and holden at the city of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and nineteen,—

The grand jurors of the United States of America, duly chosen, selected and sworn, within and for the division and district aforesaid, on their oath present:

That Harry Day, alias Harry Dean, hereinafter called the defendant, whose full and true name is other than as herein stated, to the grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit, on or about the 12th day of July, in the year of our Lord one thousand nine hundred and nineteen, at the city of Los Angeles, county of Los Angeles, within the division and district aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box, which said tin box was not then and there the original stamped package containing the said cocaine, that is to say: The said defendant did, at the time and place aforesaid, have in his possession at the corner of Figueroa street and Sunset boulevard, in the said city of Los Angeles, county of Los Angeles, the said tin box then and there containing the said cocaine, which said cocaine was then and there a compound, manufacture, salt, (4) derivative and preparation of cocoa leaves, and the said cocaine contained in the said tin box then and there consisted of about one-half (½) of an ounce; and the said tin box then and there con-

taining the said cocaine did not then and there bear and have affixed thereon appropriate tax paid stamps, as required in an act of Congress approved February 24, 1919, amending an act of Congress approved December 17, 1914, known as the 'Harrison Narcotic Law'; and the said cocaine was not then and there obtained from a registered dealer in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under the said act; and the said tin box containing the said cocaine did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name, address and registry number of the person writing the said prescription; that the said cocaine was not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and a record kept of the said dispensation, administration and giving away of the said cocaine, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States. (5)

Second Count.

And the grand jurors aforesaid, on their oath aforesaid, do further present:

That Harry Day, alias Harry Dean, hereinafter called the defendant, whose full and true name is, other than as herein stated, to the grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit, on or about the 12th day of July, in the year of our Lord one thousand nine hundred and nineteen, at the city of Los Angeles, county of Los Angeles, within the divi-

sion and district aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute morphine sulphate, cocaine and heroin in and from certain boxes and glass tubes, which said boxes and glass tubes were not then and there the original stamped packages containing the said morphine sulphate, cocaine and heroin, that is to say: The said defendant did, at the time and place aforesaid, have in his possession, at #1533 West Temple street, in the said city of Los Angeles, county of Los Angeles, the said boxes and glass tubes then and there containing the said morphine sulphate, cocaine and heroin; the said morphine sulphate, a compound, manufacture, salt, derivative and preparation of opium, was then and there contained in two (2) small boxes, which said boxes then and there contained one (1) ounce of the said morphine sulphate; the said cocaine, a compound, manufacture, salt, derivative and preparation of cocoa leaves, was then and there contained in a small metal box, which contained about one-half (½) of an ounce of the said cocaine; and the said heroin, a compound, manufacture, salt derivative and preparation of (6) opium, was then and there contained in two (2) glass tubes, which said glass tubes then and there contained about 100 tablets of the said heroin; and any and either of the aforesaid boxes and glass tubes did not then and there bear and have affixed thereon appropriate tax-paid stamps, as required in the said act; and the said morphine sulphate, cocaine and heroin was not then and there contained from a registered dealer, in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under an act of Congress approved February 24, 1919, amending an act of Congress approved

December 17, 1914, known as the Harrison Narcotic Law. And the said boxes and glass tubes, and either of them, containing the said morphine sulphate, cocaine and heroin did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name, address and registry number of the person writing said prescription. And the said morphine sulphate, cocaine and hereoin was not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon or other practitioner in the course of his professional practice, and a record kept of said dispensation, administration and giving away of the said morphine sulphate, cocaine and hereoin, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

GORDON LAWSON,
Assistant United States Attorney.
ROBERT O'CONNOR,
United States Attorney. (7)

(Endorsed): No. 1813—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Harry Day, alias Harry Dean. Indictment—Viol. Act Feb. 24, 1919, amendment to Harrison Narcotic Act. A true bill, John McPeak, foreman. Filed Sep. 4, 1919. Chas. N. Williams, clerk. Ernest J. Morgan, deputy. Bail, $1,000.00. (8)" [Rep. Tr. pp. 5 to 9, inclusive.]

It will be noted that after employing the following language: *"Did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box,*

sion and district aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute morphine sulphate, cocaine and heroin in and from certain boxes and glass tubes, which said boxes and glass tubes were not then and there the original stamped packages containing the said morphine sulphate, cocaine and heroin, that is to say: The said defendant did, at the time and place aforesaid, have in his possession, at #1533 West Temple street, in the said city of Los Angeles, county of Los Angeles, the said boxes and glass tubes then and there containing the said morphine sulphate, cocaine and heroin; the said morphine sulphate, a compound, manufacture, salt, derivative and preparation of opium, was then and there contained in two (2) small boxes, which said boxes then and there contained one (1) ounce of the said morphine sulphate; the said cocaine, a compound, manufacture, salt, derivative and preparation of cocoa leaves, was then and there contained in a small metal box, which contained about one-half (½) of an ounce of the said cocaine; and the said heroin, a compound, manufacture, salt derivative and preparation of (6) opium, was then and there contained in two (2) glass tubes, which said glass tubes then and there contained about 100 tablets of the said heroin; and any and either of the aforesaid boxes and glass tubes did not then and there bear and have affixed thereon appropriate tax-paid stamps, as required in the said act; and the said morphine sulphate, cocaine and heroin was not then and there contained from a registered dealer, in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under an act of Congress approved February 24, 1919, amending an act of Congress approved

December 17, 1914, known as the Harrison Narcotic Law. And the said boxes and glass tubes, and either of them, containing the said morphine sulphate, cocaine and heroin did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name, address and registry number of the person writing said prescription. And the said morphine sulphate, cocaine and hereoin was not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon or other practitioner in the course of his professional practice, and a record kept of said dispensation, administration and giving away of the said morphine sulphate, cocaine and hereoin, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

GORDON LAWSON,
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United States Attorney. (7)

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It will be noted that after employing the following language: *"Did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box,*

which said tin box was not then and there the original stamped package containing the said cocaine," the indictment goes on to state as follows:

"That is to say: the said defendant did at the time and place aforesaid, *have in his possession at the corner of Figueroa street and Sunset boulevard in the said city of Los Angeles, county of Los Angeles, the said tin box then and there containing the said cocaine, which said cocaine was then and there a compound, manufacture, salt, derivative and preparation of cocoa leaves, and the said cocaine contained in the said tin box then and there consisted of about one-half (½) of an ounce, and the said tin box then and there containing the said cocaine did not then and there bear and have affixed thereon appropriate tax-paid stamps, as required in an act of Congress approved December 17th, 1914, known as the Harrison Narcotic Law, etc."* (Italics are ours.)

In other words, what precedes the language, *"that is to say: etc."* (italics are ours), is modified by the language following the averment "that is to say," and the indictment is no more potent than to allege upon a certain time and place defendant below, plaintiff in error herein, had in his possession certain drugs; and it is contended that possession of narcotics is not a violation under this act. There can be no doubt that there is a contradiction of terms between the averments of the indictment. After the indictment charge that the defendant below did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine, this language is modified, amended, minimized and nullified by the allegation

beginning, "that is to say" he had said drugs in his possession at such a time and place. There is a vast distinction between the two.

If this Honorable Court does not so construe the language or if the language "that is to say, that said defendant did at the time and place aforesaid, have in his possession in the city of Los Angeles, state of California, a tin box containing cocaine, etc.," is held to be an averment of the essential facts that are necessary to set forth the offense charged in the indictment, then sufficient facts are not alleged to justify the charge in the said indictment, to-wit: the unlawful purchasing, selling, dispensing and distributing of said drugs, for possession alone is alleged, and possession in itself we contend is not sufficient to charge a sale or the dispensing or distributing of drugs, and the indictment in that respect is insufficient.

Under the Harrison Narcotic Act, prior to the amendment by act of Congress, approved February 24, 1919, to section 1 thereof, it seems to be settled that mere possession of drugs for one's own use does not fall within the inhibition of the act.

> *Wallace v. United States,* 243 Fed. 300;
> *U. S. v. Carney,* 228 Fed. 163;
> *U. S. v. Jin Moy*, 24 Fed. 1003.

We have been unable to find any case bearing upon the question as to whether or not possession of drugs in packages not having affixed thereon tax-paid stamps constitutes a violation of the Harrison Narcotic Law, as amended by the act of Congress of February 24,

1919. If such possession constitutes a violation of said act, it is conceded that the indictment herein is sufficient, and the writ of error herein is ineffectual.

The language used in the said amendment of 1919 to the said act is as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs, by any person who has not registered and paid special taxes as required by this section shall be *prima facie* evidence of liability to such special tax: * * *"

We believe that while primarily the said act is a revenue measure, it also has this object in view—to suppress illegal traffic in drugs, and that it was not intended to apply to addicts or those having the possession of narcotics for their own use. In other words, that the said act was designed against the dealer and trafficker in drugs rather than the "user."

It will in all probability be urged that that part of the indictment beginning with the words, "that is to say," etc., be rejected as surplusage, leaving the charging part of the indictment as follows: "That the defendant did knowingly, wilfully, unlawfully, fraudulently and feloniously, purchase, sell, dispense and distribute cocaine in and from a certain tin box, which said tin box was not then and there *the original stamped package* containing the said cocaine." (Italics

are ours.) But it is submitted that leaving the indictment in this form would not make it sufficient, for it merely charges him with selling, buying, etc., cocaine from a tin box, which box was not then and there the original stamped package. What is meant by the term "original stamped package"? To an ordinary person it surely could not mean a failure to have appropriate tax-paid stamps affixed to the receptacle containing the purported drugs; and we take that to be the gist of the offense herein. The term "original stamped package" in itself is meaningless, and therefore the portion of the indictment herein considered in itself does not contain facts sufficient to constitute an offense against the laws of the United States.

The principle applicable to the defects in the said indictment is not that the evidence subsequently taken shows the defendant's guilt, but that there was no proper procedure before the court to justify the taking of that evidence.

Without burdening this Honorable Court with a repetition of the allegation urged upon the first count herein, it is submitted that the second count is defective in the particulars wherein the first count of the indictment is insufficient.

It is therefore submitted that neither count of the indictment is sufficient in the particulars herein urged, and that the judgment be reversed and remanded for a new trial.

Respectfully submitted,

WARREN L. WILLIAMS,

SEYMOUR S. SILVERTON,

Attorneys for Plaintiff in Error.